Chin & Sons (1995) Sdn Bhd & Ors v William Crocket @ William Crocker & Ors

HIGH COURT (KUCHING) — ORIGINATING SUMMONS NO 24–207–96–III
STEVE SHIM J
7 AUGUST 1997

Land Law *— Easement — Extinguishment of — Whether court has jurisdiction to determine or extinguish an easement upon the landowner's application — Sarawak Land Code (Cap 8) ss 137(2), 183(1), (2) & 141 — Rules of the High Court 1980 O 15 r 16*

The plaintiffs — in reliance of ss 137(2) and 141 of the Sarawak Land Code (Cap 8) ('the Land Code') — applied for a declaratory order under O 15 r 16 of the Rules of the High Court 1980 ('the RHC') to extinguish an easement or right of way ('the easement') created over their land in favour of the defendants. The first defendant contended that the plaintiffs' reliance of ss 137(2) and 141 of the Land Code had no legal basis as the sections did not confer any jurisdiction on the court as to the extinguishment of an easement.

Held:

It is apparent that ss 137(2) and 141 do not confer any power or jurisdiction upon the court to make any order of determination or extinguishment of an easement. However, if s 141 is examined in conjunction with s 183 of the Land Code and O 15 r 16 of the RHC, it would be obvious that the court does have the power and jurisdiction regarding the determination and extinguishment of the easement. Section 183(1) and (2), like s 137(2), clearly confers certain obligations of an administrative nature on the registrar upon being served with a copy of a writ of execution, judgment, decree or order of the court. Moreover, O 15 r 16 of the RHC confers an inherent jurisdiction on the court to grant declaratory judgments or orders. The court therefore had the power and jurisdiction to make an order of determination or extinguishment of the easement upon the plaintiffs' application on merits (see pp 548G–I and 549A–F).

[Bahasa Malaysia summary

Plaintif-plaintif — yang bergantung pada ss 137(2) dan 141 Kanun Tanah Sarawak (Bab 8) ('Kanun Tanah tersebut') — telah memohon suatu perintah perisytiharan di bawah A 15 k 16 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk membatalkan suatu ismen atau hak lalu-lalang ('ismen tersebut') yang diwujudkan atas tanah mereka memihak kepada defendan-defendan. Defendan pertama menghujahkan bahawa pergantungan plaintif-plaintif pada ss 137(2) dan 141 Kanun Tanah tersebut tidak berasas kerana seksyen-seksyen tidak mengurniakan sebarang bidang kuasa atas mahkamah tentang penghapusan suatu ismen.

Diputuskan:

Adalah nyata bahawa ss 137(2) dan 141 tidak mengurniakan sebarang kuasa atau bidang kuasa pada mahkamah untuk membuat apa-apa perintah penentuan atau penghapusan suatu ismen. Walau bagaimanapun, andainya s 141 diteliti bersama dengan s 183 Kanun Tanah tersebut dan A 15 k 16 KMT, ia akan menjadi nyata bahawa mahkamah memang mempunyai kuasa dan bidang kuasa berkenaan dengan penentuan dan penghapusan ismen. Seksyen 183(1) dan (2), seperti s 137(2), jelas mengurniakan obligasi tertentu bersifat pentadbiran pada pendaftar selepas disampaikan dengan sesalinan writ pelaksanaan, penghakiman, dekri atau perintah mahkamah. Tambahan pula, A 15 k 16 KMT mengurniakan bidang kuasa sedia ada pada mahkamah untuk memberikan penghakiman atau perintah perisytiharan. Maka mahkamah mempunyai kuasa dan bidang kuasa untuk membuat perintah penentuan atau penghapusan ismen atas permohonan plaintif-plaintif atas merit (lihat ms 548G–I dan 549A–F).]

Notes

For cases on easement, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1735–1777.

Legislation referred to

Rules of the High Court 1980 O 15 r 16
Sarawak Land Code (Cap 8) ss 137(2), 141, 183, 183(1), (2)

Benedict Lim (*Tiong Lim Wong & Co*) for the plaintiffs.
Wendel Crocker (*Dominic Lai & Co*) for the first defendant.
Francis Wee (*Si & Wee*) for the second defendant.
Abdul Halim (Legal Officer, Land and Survey Department) for the third defendant.

Cur Adv Vult

Steve Shim J: By an originating summons dated 16 November 1996, the plaintiffs prayed for a declaratory order under O 15 r 16 of the Rules of the High Court 1980 ('the RHC') in a matter relating to the determination or extinguishment of an easement or right of way under ss 137(2) and 141 of the Sarawak Land Code (Cap 8) ('the Land Code'). More specifically, they seek the declarations which I reproduce hereunder:

(i) that Instrument No L 1222/1952 which created an easement (right of way) ('the easement') over part of Lot 30 Block 10 Kuching Central Land District as servient tenement and dominant to Lots 206 and 207 Block 10, 2½ Mile, Jalan Rock, 93200 Kuching (now replaced by Lot 2002, Lot 2003 and Lot 2004 as shown in plan ('C 8A') of the affidavit of William Chin ought to be extinguished as the proprietors of the dominant tenements already have alternative legal access to existing road reserves which are properly constructed public roads;

A (ii) pursuant to and consequent upon prayer (i), the Land Register and other records of the Kuching Land Registry Office of the Land and Survey Department relating to and concerning the entry and recording of Instrument No L 1222/1952 of 18 November 1952 be expunged and extinguished accordingly,

B In support there is the affidavit affirmed on 4 November 1996 by William Chin, the general manager and director of the first plaintiff. William Chin is the third plaintiff in this case. In opposing the application, the defendants have filed an affidavit affirmed on 17 January 1997 by William Crocket @ William Crocker, the first defendant. In response to this, the third plaintiff has filed his affidavit in reply affirmed on 29 January 1997. Thereafter, the C first defendant took out a summons in chambers dated 10 March 1997 seeking an order to have two questions relating to the plaintiff's originating summons dated 16 November 1996 be tried as preliminary issues. They are stated as follows:

(1) whether upon construction of s 137(2) and s 141 of the Land Code, the D first plaintiff is entitled to extinguish the registered easement of the first defendant; and

(2) whether upon construction of ss 131 and 132(f) of the Land Code, the registered easement of the first defendant can be extinguished by the first plaintiff through the declaration of this Honourable Court.

E The two issues raised have the overall effect of questioning the power and jurisdiction of the High Court in granting an order for the determination or extinguishment of the easement No L 1222/1952 created in favour of the first defendant over land owned by the plaintiffs.

Mr Wendel Crocker, counsel for the first defendant has submitted F (and this is also reflected in his supporting affidavit affirmed on 3 March 1997) that the originating summons taken out by the plaintiffs in reliance of ss 137(2) and 141 of the Land Code has no legal basis whatsoever because, according to him, s 137(2) provides for the creation of an easement and does not provide for the extinguishment of a registered easement and that s 141 merely requires the Registrar to make an entry in the register G after an easement has been determined or extinguished. He further submits that s 131 guarantees the registered easement and cannot be extinguished by anyone and that s 132 confers indefeasibility of title on the first plaintiff but subject to any easement lawfully created and subsisting on 1 January 1958. In rebuttal, Dr Lim, counsel for the plaintiffs has submitted that the court has the jurisdiction and power to order the determination or H extinguishment of an easement citing s 141 and a letter dated 8 March 1996 from the Superintendent of Land & Surveys, Kuching, the relevant para 3 of which states as follows:

> There are only four methods in which easement of such nature can be determined or extinguished viz:
>
> I (a) express release or surrender (with the agreement of all the dominant and servient tenement by way of a memorandum of transfer in Form G);
>
> (b) effluxion of time on the happening of some event agreed upon in the grant;

(c) merger; and

(d) order of court.

Although the Superintendent of Lands & Surveys was of the view that determination or extinguishment of easement could be done by an order of court, he did not specify under what authority this could be done. However, the plaintiffs in their application had referred to ss 137(2) and 141 of the Land Code, but it has to be noted that they took out the originating summons under O 15 r 16 of the RHC. Section 137(2) stipulates:

> A right of way or other easement over or affecting any land may be created by a grant in Form G in the First Schedule modified to suit the circumstances, and may be made appurtenant to other land, but no such right of way or other easement in respect of land subject to a charge shall be binding on the chargee, except so far as he has consented thereto.

This subsection relates essentially to the creation, nature and scope of an easement. It does not relate to the determination or extinguishment of an easement. That much is clear. Section 141 stipulates as follows:

> Where an easement has been determined or extinguished, the Registrar shall, upon proof to his satisfaction of the determination or the extinguishment, make an appropriate entry upon the Register and upon any relevant instrument relating thereto:
>
> Provided that, unless the determination or extinguishment was by effluxion of time or merger, the Registrar before making the entry in the Register shall give notice of his intention so to do to all persons appearing to him to be entitled to any interest under the easement or shall give at least one month's notice of his intention in the *Gazette*.

Quite obviously, the section confers an obligation on the Registrar to make the appropriate entry or entries in the land register and other relevant documents consequent upon the determination or extinguishment of an easement. It does not provide for the determination or extinguishment of an easement.

It is apparent that ss 137(2) and 141 cited above by themselves do not confer any power or jurisdiction upon the court to make any order of determination or extinguishment of an easement but when s 141 is examined in conjunction with s 183 of the Land Code and O 15 r 16 of the RHC, then I think it is unmistakably clear that the court does have the power and jurisdiction to make an order determining or extinguishing an easement. Section 183(1) and (2) reads as follows:

(1) The Registrar, on being served with a copy of a writ of execution or a judgment, decree or order of any court of competent jurisdiction and on being satisfied that an interest in land which is noted on the Register is affected thereby, shall mark on such copy the date of such service and enter a memorandum thereof on the Register, and no dealing with the interest, pursuant to such writ, judgment, decree or order shall be effected until the memorandum has been so enforced.

(2) After the interest has been dealt with pursuant to any such writ, judgment, decree or order, the Registrar shall, on presentation of an

> instrument in the appropriate form, register such instrument if presented within a period of six months from the date of service on the Registrar, or within such further time as the Court which issued such writ, judgment, decree or order, as the case may be, may in any particular case for special reasons allow, in which case no other instrument dealing with the interest and presented after the service of the copy but before the presentation of the first-mentioned instrument shall be registered or be deemed to be presented for registration; but if no such instrument is presented within the period of six months or such extended period as the Court may allow, the writ, judgment, decree or order shall cease to affect the interest.

Again this section, like s 137(2) aforesaid, confers certain obligations of an administrative nature on the registrar upon being served with a copy of a writ of execution, judgment, decree or order of the court. This brings me to O 15 r 16 of the RHC which stipulates thus:

> No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not consequential relief is or could be claimed.

Undoubtedly, the rule confers an inherent jurisdiction on the court to grant declaratory judgments or orders. And it is within the ambit of that inherent jurisdiction that the first plaintiff has sought redress in this court. In my view, he is perfectly entitled to do so.

For all the reasons given, this court therefore has the power and jurisdiction to make an order of determination or extinguishment of the easement No L 1222/1952 upon the first plaintiff's application on merits. The application has yet to be heard.

Order accordingly.

Reported by Jacob Ting